Supreme Court, U.S.
FILED

No. _____ 98 884 NOV 24 1998

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1998

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INCORPORATED,
Petitioner,

v.

BURKE COUNTY, NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Robert C. Ervin
Counsel of Record
Samuel J. Ervin
BYRD BYRD ERVIN WHISNANT MCMAHON & ERVIN P.A.
301 East Meeting Street
One Northsquare
Post Office Drawer 1269
Morganton, North Carolina 28680-1269
(828) 437-4220

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

38pp

QUESTION PRESENTED

1. Did the Fourth Circuit erroneously fail to apply the unconstitutional conditions doctrine to a situation in which the availability of a governmental contract was conditioned on forfeiture of a federal constitutional right, erroneously conclude that waiver is a defense to an unconstitutional conditions claim, and misapply waiver and unconstitutional conditions analysis to the facts of this case?

PARTIES TO THE PROCEEDINGS

Petitioner, Lake James Community Volunteer Fire Department is a non-profit corporation properly established under North Carolina law. Petitioner was the Plaintiff in the lower court proceedings of this case and was the Appellee before the United States Court of Appeals for the Fourth Circuit.

Respondent, Burke County, North Carolina, is a county and body politic organized under North Carolina law. Respondent was a Defendant to the action in the lower court proceedings and was also the Appellant before the United States Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

BASIS FOR FEDERAL JURISDICTION 15

REASONS FOR GRANTING THE WRIT 15

I. The Fourth Circuit Erred by Failing to Apply the Unconstitutional Conditions Doctrine to a Situation in Which the Availability of a Governmental Contract Was Conditioned on Forfeiture of a Constitutional Right, Inappropriately Concluding That Waiver Is a Defense to an Unconstitutional Conditions Claim, and Improperly Applying Waiver and Unconstitutional Conditions Analysis to the Facts of this Case 15

A. The Fourth Circuit Failed to Apply the "Unconstitutional Conditions" Doctrine in Reversing the District Court's Opinion 20

B. The Fourth Circuit's Voluntariness and Waiver Analysis Overlooks Factors Previously Deemed Important by this Court Which Should Be Considered in an Appropriate Balancing of the Affected Interests 23

C. The Fourth Circuit Erroneously Concluded That an Unconstitutional Conditions Claim Is Subject to a Waiver Defense 26

D. Assuming That Waiver Is a Defense to an Unconstitutional Conditions Claim, the Fourth Circuit Erred by Finding the Alleged Waiver at Issue Here to Have Been Valid 27

E. The Fourth Circuit Misapplied the Balancing Test Which Must Be Conducted in "Unconstitutional Conditions" Cases 28

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505,
91 L.Ed.2d 202 (1986).....21

AT&T Technologies v. Communications Workers,
475 U.S. 643, 106 S.Ct. 1415,
89 L.Ed.2d 648 (1986).....22

Blackburn v. Snow,
771 F.2d 556 (1st Cir. 1985).....23

Board of Commissioners v. Umbehr,
518 U.S. 668, 116 S.Ct. 2342,
135 L.Ed.2d 843 (1996).....17

Brady v. United States,
397 U.S. 742, 90 S.Ct. 1463,
25 L.Ed.2d 747 (1970).....22

California Motor Transportation Company v.
Trucking Unlimited, Inc.,
404 U.S. 508, 92 S.Ct. 609,
30 L.Ed.2d 642 (1972).....15

D.H. Overmeyer Company v. Frick Company,
405 U.S. 174, 92 S.Ct. 775,
31 L.Ed.2d 124 (1972)..... *Passim*

Fraternal Order of Police Lodge No. 5 v. City of
Philadelphia,
812 F.2d 105 (3d Cir. 1987).....27

G&V Lounge, Inc.v. Michigan Liquor Control Commission,
23 F.3d 1071 (6th Cir. 1994).....23

Hudson v. Palmer,
468 U.S. 517, 104 S.Ct. 3194,
82 L.Ed.2d 393 (1984) 15

Johnson v. Zerbet,
304 U.S. 458, 58 S.Ct. 1019,
82 L.Ed.2d 1461 (1938) 22

Keyishian v. Board of Regents,
385 U.S. 589, 87 S.Ct. 675,
17 L.Ed.2d 629 (1967) 16

Laird v. Tatum,
408 U.S. 1, 92 S.Ct. 2318,
33 L.Ed.2d 154 (1972) 16

Lake James Community Volunteer Fire Department , Inc.
v. Burke County, NC
149 F.3d 277 (4th Cir. 1998) ..... *Passim*

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1993) 27

Perry v. Sinderman,
408 U.S. 593, 92 S.Ct. 2694,
33 L.Ed.2d 570 (1972) 22

Rosenberger v. Rector and Visitors of the
University of Virginia,
18 F.3d 269 (4th Cir. 1994), rev'd on other grounds,
515 U.S. 819, 115 S.Ct. 2510,
132 L.Ed.2d 700 (1995) 23

Sherbert v. Varner,
374 U.S. 398, 83 S.Ct. 1790,
10 L.Ed.2d 965 (1963) 17

Snepp v. United States,
444 U.S. 507, 100 S.Ct. 763,
62 L.Ed.2d 704 (1980).....22

Town of Newton v. Rumery,
480 U.S. 386, 107 S.Ct. 1187,
94 L.Ed.2d 405 (1987)..... *Passim*

Statutes and Rules

Rule 10(a)
of the Rules of the United States Supreme Court.....23, 27

Rule 10(b)
of the Rules of the United States Supreme Court.....30

Rule 10(c)
of the Rules of the United States Supreme Court..... *Passim*

N.C. Gen. Stat. §55-8-08 .....7, 9

N.C. Gen. Stat. §69-25.1 4

N.C. Gen. Stat. §69-25.4 7

N.C. Gen. Stat. §69-25.5 .....4, 7, 8

N.C. Gen. Stat. §69-25.7 .....7, 8

N.C. Gen. Stat. §69-25.11 ..... *Passim*

N.C. Gen. Stat. §69-25.11(4).....10, 11, 18, 29

N.C. Gen. Stat. §69-25.12 9

N.C. Gen. Stat. §69-25.13 9

28 U.S.C. §1331 15

28 U.S.C. §1441(b) 15

28 U.S.C. §1441(c) 15

Constitutional Provisions

Article I, Section 18 of the North Carolina Constitution ... 20

First Amendment to the United States Constitution 2

Section 1 of the Fourteenth Amendment to the United States Constitution 2

Fourteenth Amendment to the United States Constitution 2, 15, 17, 20

PETITION FOR WRIT OF CERTIORARI

The petitioner, Lake James Community Volunteer Fire Department, Inc. (hereinafter "Lake James"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which Lake James seeks to have reviewed by this Court is reported at Lake James Community Volunteer Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277 (4th Cir. 1998), and is reprinted in the Appendix (hereinafter "App.") at pages App.1-12. The opinion and judgment of the United States District Court for the Western District of North Carolina is unpublished and is reprinted at App. 13-36.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 15, 1998. [App. pp. 1-12]. Lake James timely filed a Petition For Rehearing And Suggestion For Rehearing En Banc on July 28, 1998. On August 5, 1998, the United States Court of Appeals for the Fourth Circuit requested the respondent, Burke County, North Carolina (hereinafter "Burke County"), to respond to Lake James' rehearing petition on or before August 17, 1998. On August 17, 1998, Burke County filed the Defendant's Appellant's Answer To Petition For Rehearing And Suggestion For Rehearing En Banc. On August 26, 1998, the United States Court of Appeals for the Fourth Circuit denied Lake James' request for rehearing. [App. p. 37]. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Gen. Stat. §69-25.11:

> After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:
>
> . . . .

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

STATEMENT OF THE CASE

A. Procedural History

On July 3, 1996, Lake James[1] filed a civil action in the Superior Court of Burke County, North Carolina,[2]

[1]Lakes James is a non-profit corporation properly established under North Carolina law for the purpose of providing fire protection services

seeking declaratory and injunctive relief against Burke County[3] on the basis of allegations that certain provisions of a fire protection service contract between Lake James and Burke County violated Lake James' federal and state constitutional rights and that Burke County had unlawfully retaliated against Lake James by insisting upon the inclusion of certain terms in this fire protection services contract because of Lake James' previous decisions to exercise certain federal and state constitutional rights. On the same date, the Superior Court entered a temporary restraining order prohibiting Burke County from declaring that Lake James had breached the terms and conditions of the fire protection services contract or attempting to terminate that contract. On July 22, 1996, Burke County removed this action from the Superior Court of Burke County, North Carolina, to the United States District Court for the Western District of North Carolina on the basis of that Court's federal question jurisdiction. On July 26, 1996, the Honorable Lacy H. Thornburg, United States District Judge for the Western District of North Carolina (hereinafter "the District Court"), entered a preliminary injunction enjoining Burke County from declaring that Lake James had breached the fire protection services contract or from terminating the contract during the pendency of this action.

---

in the Lake James Fire District, a rural fire protection district created pursuant to N.C. Gen. Stat. §69-25.1 located in western Burke County, North Carolina. Contracting with a community volunteer fire departments such as Lake James is one way in which a North Carolina county may meet its statutory obligation to provide fire protection services in rural areas. N.C. Gen. Stat. §69-25.5.

[2]The Superior Court is the highest level trial court in North Carolina's General Court of Justice.

[3]Burke County is a county and body politic organized under North Carolina law located in the Western District of North Carolina. Burke County is governed by a five member body known as the County Commission.

On August 12, 1996, Burke County filed an Answer And Counterclaim in which Burke County denied the material allegations of Lake James' complaint and requested the Court to declare that Lake James had materially breached the fire protection services contract between Lake James and Burke County by initiating litigation against Burke County. On September 4, 1996, Lake James replied to Burke County's counterclaim. On October 1, 1996, Lake James requested leave of court to amend its complaint for the purpose of requesting a declaration by the Court that certain territorial transfers approved by Burke County were unlawful and should be declared null and void. The District Court allowed the proposed amendment on December 11, 1996. On December 23, 1996, Burke County filed an Amended Answer And Counterclaim denying the material allegations of Lake James' amendment.

After the completion of the discovery process, both Lake James and Burke County moved for summary judgment on March 31, 1997. On May 13, 1997, the District Court entered a Judgment And Memorandum and an Order granting summary judgment "on all claims" in favor of Lake James and granting Lake James permanent injunctive relief. In its decision, the District Court concluded that the "no challenge" provision of the fire protection services contract between Lake James and Burke County contravened the "unconstitutional conditions" doctrine by impermissibly depriving Lake James of its right to petition for redress of grievances and that two transfers of territory from the Lake James Fire District to another fire district were unlawful. [App. pp. 13 - 36]. On June 11, 1997, Burke County noted an appeal to the United States Court of Appeals for the Fourth Circuit (hereinafter "the Fourth Circuit") from the District Court's decision.

On July 15, 1998, a unanimous panel of the Fourth Circuit filed an opinion reversing the District Court's decision and remanding this case "for further proceedings in light of our holdings." Lake James Community Volunteer

Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277, 282 (4th Cir. 1998). On July 28, 1998, Lake James filed a Petition For Rehearing And Suggestion For Rehearing En Banc. On August 5, 1998, the Fourth Circuit requested Burke County to respond to Lake James' rehearing petition. On August 17, 1998, Burke County filed a Defendant's-Appellant's Answer To Petition For Rehearing And Suggestion For Rehearing En Banc. On August 26, 1998, the Fourth Circuit denied Lake James' rehearing petition. [App. p. 37].

B. Substantive Facts

Lake James began providing fire protection services in the Lake James Fire District in 1969 and continually provided such services until the present controversy began in the spring of 1994. At that time, a group of individuals who referred to themselves as "Concerned Citizens" began requesting information concerning Lake James' operations from Lake James' Board of Directors and the Burke County staff and advanced a number of criticisms of the existing department. Supporters of the Concerned Citizens faction elected a majority of the members of Lake James' Board of Directors at the June 9, 1994, annual meeting.

After the election results had been announced, the firefighters who actually provided fire protection services in Lake James' territory met briefly and turned in their gear.[4] As a result, Burke County Fire Marshall Kevin Stewart (hereinafter "the County Fire Marshall") made arrangements for volunteer fire departments serving three adjoining fire districts to respond to fire calls in the Lake James Fire District. After eight days, during which no fires occurred, the firefighters reached an understanding with the new Board of Directors and returned to duty, allowing Lake James to resume the provision of fire protection services.

[4]The firefighters were not paid employees of Lake James; instead, they volunteered their time and services to Lake James.

In August, 1994, Bruce Ervin and Helen McDowell, two residents of the Lake James Fire District who were members of Lake James, initiated civil litigation in the Superior Court of Burke County, North Carolina, seeking to compel the newly-elected Concerned Citizens-controlled Board of Directors to convene a special membership meeting for the purpose of considering removing members of Lake James' Board of Directors pursuant to N.C. Gen. Stat. §55-8-08. After the filing of this civil action, the Board of Directors voted to conduct the requested removal election by mail. In November, 1994, the membership voted not to remove the existing directors, leaving the Concerned Citizens in control of Lake James.

On March 22, 1995, the Concerned Citizens-controlled Board of Directors voted five to two to cease providing fire protection in the Lake James Fire District. At approximately the same time, the Board proposed that Lake James be dissolved, with Lake James' existing territory to be divided among two adjoining fire districts. On March 27, 1995, Lake James paid $23,931.50 to Burke County for the purpose of returning fire tax money which had been paid to Lake James in exchange for its commitment to provide fire protection service from March 23, 1995, until June 30, 1995.[5] Given that it still had a statutory obligation under N.C. Gen. Stat. §69-25.5 to provide fire protection services in the Lake James Fire District, Burke County made arrangements with the fire departments serving adjoining fire districts to provide temporary fire protection service in the Lake James Fire District after receiving word of the Board's

[5]The monies used to support Lake James' operations came from the proceeds of a special tax levied by the Burke County Commission upon those owning property in the Lake James Fire District. N.C. Gen. Stat. §69-25.4. The Burke County Commission collects these tax payments and uses them to provide fire protection services in the relevant rural fire district in accordance with N.C. Gen. Stat. §69-25.5. N.C. Gen. Stat. §69-25.7. As a result, the only source of funding available to Lake James was its contract with Burke County.

action. On April 20, 1995, Burke County contracted with the West End Volunteer Fire Department, Inc. (hereinafter "West End"), the Town of Glen Alpine (hereinafter "Glen Alpine"), and the Oak Hill Fire and Rescue Protection Association, Inc. (hereinafter "Oak Hill"), to provide fire protection services in the Lake James Fire District through June 30, 1995. In August, 1995, Burke County executed additional contracts with West End, Glen Alpine, and Oak Hill to provide fire protection and first responder service in the Lake James Fire District for an additional period of time.

On April 6, 1995, Burke County filed suit against Lake James in the Superior Court of Burke County, North Carolina, alleging that Lake James had breached its contract with Burke County by canceling the existing fire protection services agreement and seeking to recover from Lake James "all equipment, fire trucks, other assets, and tax dollars currently sitting in bank accounts under [Lake James'] control which represent tax dollars or fire-tax dollars, or equipment and assistance provided by said fire tax dollars." In April, 1995, Bruce Ervin, a resident of the Lake James Fire District and a Lake James member, moved to intervene in Burke County's action against Lake James for the purpose of preventing the transfer of Lake James' assets to Burke County without the approval of Lake James' members as required by North Carolina law. On April 10, 1995, the Superior Court entered a temporary restraining order prohibiting the transfer of any Lake James assets to Burke County without approval by Lake James' membership. Subsequently, Bruce Ervin was permitted to intervene in Burke County's action against Lake James and obtained the issuance of a preliminary injunction which effectively continued this temporary restraining order in effect until a decision on the merits.

As this litigation proceeded, certain Lake James members circulated a petition seeking the removal of the Concerned Citizens-affiliated directors who had voted to cancel Lake James' contract with Burke County pursuant to

N.C. Gen. Stat. §55-8-08. When the Concerned Citizens-controlled Board of Directors failed to act on this petition, Brent Fox, a resident of the Lake James Fire District and a Lake James member, filed a civil action against Lake James in the Superior Court of Burke County, North Carolina, seeking the entry of an order compelling the convening of a special meeting of Lake James' membership to consider the removal of the Concerned Citizens-affiliated directors. On July 28, 1995, the Superior Court ordered that such a special membership meeting be held. After this judicial decision, the Concerned Citizens-affiliated directors conducted an expedited membership vote on their plan for dissolving Lake James, a proposal which the membership rejected. On August 21, 1995, immediately prior to the special meeting of Lake James membership which had been convened to consider removing them from office, the remaining Concerned Citizens-affiliated directors resigned.

After the resignation of the remaining Concerned Citizens-affiliated directors, Lake James began to reorganize under court supervision. On November 11, 1995, Lake James held an annual meeting and elected new directors, who immediately contacted Burke County and attempted to negotiate a new fire protection services contract with the County. As Lake James reorganized, individuals affiliated with the Concerned Citizens began to circulate petitions proposing the transfer of various portions of the Lake James Fire District to adjoining fire districts.[6] Residents of the Holiday Shores area and a small territory located on the Gwaltney Road petitioned to have their properties transferred from the Lake James Fire District to the West End and Oak

---

[6]A transfer of territory from the Lake James Fire District to another fire district posed a serious financial threat to Lake James, since the owners of any property removed from the Lake James Fire District and added to another fire district would stop paying taxes to support service in the Lake James Fire District and begin paying taxes to support service in the new fire district. N.C. Gen. Stat. §69-25.12; N.C. Gen. Stat. §69-25.13.

Hill Fire Districts. Individuals affiliated with the Concerned Citizens circulated a petition to transfer territory along the St. Paul's Church and Powerhouse Roads from the Lake James Fire District to the Glen Alpine Fire District (hereinafter "the Powerhouse Road petition"). The Powerhouse Road petition was delivered to the Burke County staff in October or November, 1995, and presented to the Burke County Commission on November 25, 1995, at which time the County Commission was scheduled to consider whether to call for a public hearing concerning the Powerhouse Road petition pursuant to N.C. Gen. Stat. §65-25.11. A few minutes before the November 25, 1995, County Commission meeting began, Rodney Hall, a newly-elected member of Lake James' Board of Directors, submitted documentation that thirteen individuals who had signed the Powerhouse Road petition wished to withdraw their names from that document. Although the Burke County staff expressed concern that the Powerhouse Road petition lacked sufficient signatures to comply with N.C. Gen. Stat. §69-25.11(4), the County Commission voted to hold a public hearing on the Powerhouse Road petition at the December, 1995, meeting and established a December 7, 1995, cut-off date for adding signatures to or withdrawing signatures from the Powerhouse Road petition.

Prior to the cut-off date, proponents of the Powerhouse Road petition and members of Lake James' newly-elected Board of Directors submitted signatures to the Burke County staff in support of their respective positions. After reviewing this information, the Burke County staff validated the signatures of 154 persons as supportive of the Powerhouse Road petition, determined that there were 228 property owners in the affected area, and effectively concluded that 152 property owners needed to sign the Powerhouse Road petition in order to comply with the

relevant statute.[7] On December 18, 1995, Lake James corresponded with the Burke County staff for the purpose of informing Burke County that three property owners and four tax exempt landowners had been omitted from staff's tabulation of affected landowners and that the inclusion of these property owners in the relevant calculation established that the Powerhouse Road petition lacked the 155 signatures required by N.C. Gen. Stat. §69-25.11(4). On December 19, 1995, Lake James informed the County Fire Marshall in writing that the boundary of the Powerhouse Road petition area bisected several other properties and that the eleven owners of these properties should be included in the necessary signature calculation, a fact which raised the statutorily-required number of signatures to 164. Lake James presented this information and supporting arguments to the County Commission at the December 19, 1995, public hearing. Although an earlier Burke County Commission had been advised by a former county attorney that tax exempt property must be included in the counting process, the Burke County Commission voted three to two to approve the Powerhouse Road petition and transferred the area in question to the Glen Alpine Fire District effective June 30, 1996.

Lake James and Burke County continued to discuss a new fire protection services contract during the pendency of the Powerhouse Road petition. As these discussions progressed, Lake James' equipment passed a properly-conducted service test, Lake James' building was brought up to code, and Lake James passed an inspection conducted by the North Carolina Department of Insurance. After Burke County failed to act on a request for the advancement of sufficient money to permit the department to reopen, Lake James borrowed the necessary funds from a bank. At the

[7]Given the existence of different fire tax rates in the Lake James and Glen Alpine Fire Districts, the propriety of the proposed transfer depended upon the application of N.C. Gen. Stat. §69-25.11(4).

conclusion of this process, a proposed contract was negotiated between Lake James and the Burke County staff.

When the proposed contract was presented to the Burke County Commission on January 16, 1996, Commissioner James Reid Simpson (hereinafter "Commissioner Simpson") moved that the proposed contract be modified as follows:

> Provided, however, that this Contract shall contain a provision allowing any citizen or group in the Lake James Fire Tax District to petition the County to be annexed into another fire tax district without any further consent of the Lake James Volunteer Fire Department or with the consent of the Lake James Volunteer Fire Department being contractually presumed (the "Consent Provision"); and
>
> FURTHER RESOLVED, that this Contract shall further provide that should the Lake James Volunteer Fire Department refuse its consent, or challenge in the judicial system or otherwise the legality of this Consent Provision, or challenge the legality of any changes in their Fire Tax District Lands under N.C.G.S. §69-25.11 taking place effective as of June 30, 1996, that any such actions will constitute a material breach of the Contract resulting in the immediate termination of the Contract; and
>
> FURTHER RESOLVED, that this Consent Provision shall not be removed or excluded from this or any contract with the Lake James Volunteer Fire Department by any subsequent action of this Board without the unanimous vote of the Burke County Board of Commissioners.

The Burke County Commission approved Commissioner Simpson's motion by a vote of three to two. As a result, a revised contract between Lake James and Burke County was prepared by Burke County which included the following Paragraph No. 11(b)(iv):

> The Lake James Community Volunteer Fire Department, Inc., specifically agrees to allow any citizen, group of citizens, and/or property owner being served by the Lake James Community Volunteer Fire Department, Inc. (or property owners having property within the Lake James Fire Tax District) to petition the County to be considered for an annexation into another Fire Tax District (reference Chapter 69 of the North Carolina General Statutes) without any further consent of the Lake James Community Volunteer Fire Department, Inc. Further that the parties agree that any consent required by Chapter 69 with regard to such a petitioning process shall be presumed to have been given by the Lake James Community Volunteer Fire Department, Inc. (This paragraph 11.B.iv is hereinafter referred to as "Consent Provision"). However, the parties agree that should the Lake James Community Volunteer Fire Department, Inc. refuse its consent to any above-referenced petition or challenge in the judicial system or otherwise the legality of the above-referenced Consent Provision, or otherwise challenge the legality of any of the changes in the Fire Tax District lines under N.C.G.S. §69-25.11 taking place effective as of or after June 30, 1996, then the parties agree any such action will constitute a

> material breach of this Contract resulting in immediate termination of the contract. . . .

[App. p. 42-43]. In response, Lake James proposed a revised contract to Burke County which was identical to that proposed by Burke County except for the deletion of Paragraph No. 11(b)(iv). The Burke County Commission rejected Lake James' counterproposal by a vote of two to two. Faced with the Hobson's choice of either executing a proposed contract which included Paragraph No. 11(b)(iv) or losing the ability to reopen due to the absence of a contract with Burke County, Lake James executed the contract approved by the County Commission on February 26, 1996. On March 1, 1996, Lake James reopened and resumed providing fire protection services.

At the same approximate time, supporters of the Concerned Citizens group petitioned to transfer the East Shores subdivision and certain other territory adjacent to that covered by the Powerhouse Road petition to the Glen Alpine Fire District (hereinafter "the East Shores petition"). The validity of the East Shores petition hinged upon the lawfulness of the Powerhouse Road petition, since N.C. Gen. Stat. §69-25.11 limits territorial transfers to property adjacent to some portion of the transferee district. On August 20, 1996, the Burke County Commission scheduled a public hearing on the East Shores petition and established cut-off dates for the submission of additional signatures on and challenges to the East Shores petition. In apt time, Lake James submitted the names of individuals who wished to withdraw their signatures from the East Shores petition and challenged both the petition and the procedures utilized in the petitioning process on a number of grounds, including the invalidity of the Powerhouse Road petition. On September 17, 1996, after the initiation of the present litigation, the Burke County Commission approved the East Shores petition by a three to one vote.

BASIS FOR FEDERAL JURISDICTION

The United States District Court for the Western District of North Carolina had jurisdiction over Lake James' federal constitutional claims pursuant to its federal question and removal jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1441(b) and over Lake James' state constitutional and statutory claims pursuant to its supplemental and removal jurisdiction under 28 U.S.C. §1367 and 28 U.S.C. §1441(c).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit erred by failing to apply the unconstitutional conditions doctrine to a situation in which the availability of a governmental contract was conditioned on forfeiture of a constitutional right, inappropriately concluding that waiver is a defense to an unconstitutional conditions claim, and improperly applying waiver and unconstitutional conditions analysis to the facts of this case.

The constitutional right to petition the Government for redress of . . . grievances" under the First and Fourteenth Amendments to the United States Constitution "includes a reasonable right of access to the courts." Hudson v. Palmer, 468 U.S. 517, 523, 104 S.Ct. 3194, _____, 82 L.Ed.2d 393, 401. See also: California Motor Transportation Company v. Trucking Unlimited, Inc., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The "no challenge" provision of Paragraph No. 11(b)(iv) of the fire protection services contract between Lake James and Burke County, which prohibited Lake James from initiating litigation against Burke County for the purpose of challenging either the consent provision or any territorial transfer (such as the

Powerhouse Road petition, which the Burke County Commission had recently approved, or the East Shores petition, which was then being circulated) to be effective as of or after June 30, 1996, clearly required Lake James to forgo this federal constitutional right. As a result, the only way in which Lake James could obtain the fire protection services contract necessary for its survival was to forfeit its federal constitutional right to access to the courts.

The "unconstitutional conditions" doctrine has evolved to deal with governmental attempts to condition the availability of public benefits upon the forfeiture of federal constitutional rights.

> Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit.

Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, _____, 135 L.Ed.2d 843, 851 (1996) citing Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, _____, 33 L.Ed.2d 570, 577 (1972). See also: Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Sherbert v. Varner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). A plaintiff is entitled to relief under the "unconstitutional conditions" doctrine in the event that the prohibited conduct implicates "matters of public concern" which outweigh the governmental interest "'in

promoting the efficiency of the public services it performs.'" Board of County Commissioners v. Umbehr, 518 U.S. 668, 675-676, 116 S.Ct. 2342, _____, 135 L.Ed.2d 843, 852 (1995).

Lake James argued, and the District Court found, that the "no challenge" provision constituted an invalid constitutional condition which entitled Lake James to relief. The District Court found that the "no challenge" provision impaired Lake James' right of access to the courts guaranteed by the First and Fourteenth Amendments. [App. pp. 18-19. The District Court concluded that the "no challenge" clause had the required nexus to public rather than private concerns given that ensuring adequate revenues to permit proper fire service and properly allocating those revenues is indubitably a matter of public concern and that the "no challenge" provision effectively precluded Lake James from challenging unlawful territorial transfers which implicated these concerns. [App. p. 20]. The District Court further found that a proper balancing of the relevant interests favored Lake James. On the one hand, the District Court determined that the "no challenge" provision completely deprived local citizens of input from those "'who are often in the best position to know what ails the agency for which they work,'" Board of Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843, 851 (1995), and "muzzles the very watchdog most likely to seek redress for improper governmental activity." [App. pp. 21-22]. The District Court found, on the other hand, that the "no challenge" provision did not serve any governmental need except Burke County's desire to stifle Lake James' access to the Courts. Although Burke County claimed that the "no challenge" provision assisted in "ensuring consistently reliable fire protection for its citizens" by protecting "the public's expectation to choose, subject to the County's approval, which fire district would serve their needs," the District Court pointed out that this alleged "right to choose" was significantly limited by the necessity for compliance

with N.C. Gen. Stat. §69-25.11(4). [App. p. 22]. Furthermore, the District Court noted the complete absence of any evidence "tending to show that challenges to the legality of fire territory transfers would have led or would lead to reduced fire-service reliability." [App. p. 22].[8] Instead, as the District Court concluded, the only effect and obvious purpose of the "no challenge" provision was to prevent Lake James from challenging questionable territorial transfers which the Burke County Commission had approved or might approve. [App. p. 23].[9] Had fire service reliability been Burke County's real aim, the District Court held that much more narrowly drawn out contract language would have sufficed to protect this interest. [App. P. 23]. As a result, Lake James contends and the District Court found that the "no challenge" provision failed the "balancing" test employed to determine the validity of an "unconstitutional condition" and should be invalidated.[10]

---

[8] When asked if there was any need to "include paragraph 11(b)(iv) into the Lake James contract as a matter of fire protection," Burke County Emergency Services Director Clint Patton responded, "Not for fire protection purposes, no." [Patton Dep., pp. 67-68]. Similarly, when asked whether he saw "any reason related to the provision of fire protection services to justify the inclusion of paragraph 11(b)(iv) into the contract," the County Fire Marshall responded, "No, sir, no validity as far as fire protection was concerned." [Stewart Dep., p. 80]. When asked to explain how the consent provision furthered fire service reliability goals, Commissioner Simpson was unable to do so.

[9]Commissioner Simpson testified in his deposition that he proposed the "no challenge" provision because "a lot of issues concerning this fire department were taken to the judicial system and that all the folks involved were spending a lot of their own money or fire tax money or other public funds using the judicial system as a forum in which their disputes could at least be made public if not settled." [Simpson Dep., p. 25].

[10]The District Court further found that Burke County acted unlawfully in approving both the Powerhouse Road and East Shores petitions. [App. pp. 24-29]. Burke County did not challenge these rulings before the Fourth Circuit. As a result, assuming that the Fourth Circuit's decision to

The logic employed by the Fourth Circuit in reversing the District Court's decision was diffuse, difficult to follow, and inconsistent with the analysis uniformly applied by this Court for the purpose of evaluating cases in which the availability of governmental benefits was conditioned upon the forfeiture of constitutional protections. First, the Fourth Circuit attempted to determine, in reliance upon this Court's decisions in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), neither of which involved the "unconstitutional conditions" doctrine, whether Lake James acted voluntarily in executing the contract and whether the public policy harms resulting from the "no challenge" and "consent" provisions outweighed the interest promoted by the enforcement of those provisions, an analysis to be undertaken on the basis of a presumption of enforceability. Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 280 (4th Cir. 1998). As a result of the fact that Lake James understood the import of the "consent" and "no challenge" provisions, had the assistance of counsel, and had the option of not entering into any contract at all,[11] the Fourth Circuit found the necessarily "voluntariness." Lake James Community Volunteer Fire Department v. Burke County, NC 149 F.3d 277, 281 (4th Cir. 1998). Moreover, given its conclusion that the "consent" and "no challenge" provisions furthered the public policy interest in allowing citizens to choose the fire department from which they wished to take

---

overturn Paragraph No. 11(b)(iv) of the fire protection services contract is reversed, the District Court's decision with respect to these territorial transfers would be reinstated.

[11]Under the Fourth Circuit's preferred analysis, it is difficult to see how any set of facts not involving actual duress or coercion would be sufficient to invalidate contract provisions.

service, that these provisions were "narrowly tailored" to effectuate this interest in citizen choice, and that Burke County had no obligation to contract with Lake James at all, the Fourth Circuit concluded that its preferred balancing test favored enforceability. Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 281-282 (4th Cir. 1998). Almost as an afterthought, the Fourth Circuit stated that the "unconstitutional conditions" doctrine ."does not categorically preclude parties from negotiating contractual relationships that include waivers of constitutional rights such as a covenant not to sue" and that "the public interest . . . in favor of the citizen's right to select a reliable fire department of their choice" outweighed Lake James' "interest in its continued existence to provide fire protection to the Lake James Fire District." Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 282 (4th Cir. 1998).[12] The Fourth Circuit's approach to this case is fundamentally in error and should be reviewed by this Court.[13]

A. The Fourth Circuit failed to apply the "unconstitutional

---

[12]Lake James had claimed that Burke County's actions violated Article I, Section 18 of the North Carolina Constitution as well as the First and Fourteenth Amendments to the United States Constitution. The Fourth Circuit rejected Lake James' state constitutional challenge to Burke County's actions on the same grounds that it rejected Lake James' federal constitutional claim. As a result, the validity of Lake James' state constitutional claim rises and falls with the validity of its federal constitutional claim.

[13]The District Court decided this case on the basis of the parties' cross motions for summary judgment. [App. pp. 16-17]. Neither lower court concluded that there was any dispute as to a genuine issue of material fact. As a result, the only issue before both the District Court and the Fourth Circuit was the extent to which either party was entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

conditions" doctrine in reversing the district court's opinion.

The District Court analyzed the contested provisions of the contract under the "unconstitutional conditions" doctrine and concluded that the "no challenge" provision constituted an impermissible infringement upon Lake James' right of access to the courts. The Fourth Circuit, on the other hand, defined the relevant issue as "whether the Fire Department's agreement to consent to citizens' petitions and not to challenge them in court is enforceable." Lake James Community Volunteer Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277, 280 (4th Cir. 1998). Given that a contract which a party enters into voluntarily "will be enforced unless the interest promoted by its enforcement is outweighed by the public policy harm resulting from its enforcement," citing Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 954 L.Ed.2d 405 (1987); the claim that "simply because a contract includes a waiver of a constitutional right does not render the contract per se unenforceable," citing D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), and its conclusion that the public policy interests furthered by the disputed provisions outweighed the harm worked by enforcing these provisions against Lake James. the Fourth Circuit held the disputed contract provisions to be enforceable. As a result, the Fourth Circuit treated this case as a dispute involving a garden-variety commercial contract instead of applying the "unconstitutional conditions" doctrine.

This Court has developed the "unconstitutional conditions" doctrine for the purpose of analyzing situations in which, "even though a person has no 'right' to an available governmental benefit," the government withholds that benefit "on a basis that infringes his constitutionally-protected interests." Perry v. Sinderman, 408 U.S. 593, 597,

92 S.Ct. 2694, _____33 L.Ed.2d 570, 577 (1972). The facts of this case, in which Burke County refused to contract with Lake James unless Lake James agreed not to seek access to the courts for the purpose of challenging territorial transfers which the District Court held to have been unlawful, fall squarely withing the ambit of the "unconstitutional conditions" doctrine. Although the Fourth Circuit did make reference to the "unconstitutional conditions" doctrine near the conclusion of its opinion, this reference clearly appears in the context of a discussion of the contentions advanced by Lake James and does not constitute a statement of the basis for the Fourth Circuit's decision. Neither of the two decisions by this Court upon which the Fourth Circuit placed principal reliance involved an application of the "unconstitutional conditions" doctrine; instead, the decisions in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 127 (1972), involved the validity of contracts executed in essentially private contexts and the decision in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), did not even involve a claim that the disputed contract provision was unenforceable for constitutional reasons.[14] As a result, the Fourth Circuit decided this case on the basis of generalized waiver principles instead of an application of the "unconstitutional conditions" doctrine.

Until the Fourth Circuit's decision in this case, the federal courts of appeal had uniformly decided similar controversies by applying the "unconstitutional conditions"

---

[14]The same is true of the other decisions cited in this portion of the Fourth Circuit's analysis, including Johnson v. Zerbet, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Snepp v. United States, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980); and AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

doctrine. Eg. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985); Fraternal Order of Police Lodge No. 5 v. Philadelphia, 812 F.2d 105 (3d Cir. 1987); G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994). By purporting to decide this case using a generalized voluntariness and waiver analysis instead of by applying the unconstitutional conditions doctrine, which has expressly been developed to deal with efforts to condition the availability of governmental benefits on the forfeiture of important federal constitutional rights, the Fourth Circuit has introduced a considerable element of confusion into the law governing the governmental contracting process and has either "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Rule 10(a) of the Rules of the United States Supreme Court, or "decided an important question of federal law that [either] has not been, but should be, settled by this Court, or . . . decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the United States Supreme Court.[15] As a result, this Court should grant certiorari to permit review of the Fourth Circuit's decision.

B. The Fourth Circuit's voluntariness and waiver analysis overlooks factors previously deemed important by this Court which should be considered in an appropriate

[15]The Fourth Circuit's decision to decide this case on generalized voluntariness and waiver analysis instead of the "unconstitutional conditions" doctrine was particularly harmful to Lake James given the fact that the Fourth Circuit's balancing test presumes enforceability while the "unconstitutional conditions" doctrine adopts a contrary presumption. Rosenberger v. Rector and Visitors of the University of Virginia, 18 F.3d 269 (4th Cir. 1994), rev'd on other grounds, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

balancing of the affected interests.

Assuming, without in any way conceding, that the Fourth Circuit adopted the appropriate test for analyzing the validity of the "consent" and "no challenge" provisions of the fire protection services contract, the Fourth Circuit failed to properly analyze the relevant facts under that test. A careful reading of both Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1186, 94 L.Ed.2d 405 (9187), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), establishes that a valid contractual waiver of a federal constitutional right must be first determined to be voluntary,[16] a condition which does not exist in cases involving "unequal bargaining power or overreaching," a "contract of adhesion," or a refusal to deal in the absence of the disputed provisions. D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 186, 92 S.Ct. 725, _____, 31 L.Ed.2d 124, 134 (1972). The District Court found, and the Fourth Circuit did not dispute,[17] that the present contract involved parties with vastly unequal bargaining power and resulted in a contract of adhesion in which Burke County refused to deal with Lake James in the

---

[16]The test adopted by the Fourth Circuit requires that a valid waiver also be knowing and intelligent. Lake James Community Volunteer Fire Department, Inc. v. Burke County, N.C. 149 F.3d 277, 281 (4th Cir. 1998). Lake James does not dispute that it knew of and understood the "consent" and "no challenge" provisions when it executed the fire protection services contract.

[17]The Fourth Circuit in fact stated that "making a choice rendered difficult because of a weak bargaining position of its own creation does not render the execution of the contract involuntary," Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 281 (1998), a statement which simply flies in the face of this Court's recognition in D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 186, 92 S.Ct. 775, _____31 L.Ed.2d 124, 134 (1972), that voluntariness does not exist in a case of unequal bargaining power.

absence of the "consent" and "no challenge" provisions and in which Lake James received no additional benefit as the result of the inclusion of the disputed provisions in the contract. The simple fact of the matter is that Burke County gave Lake James the choice of either signing a contract containing the "consent" and "no challenge" provisions or suffering corporate death, an outcome which is hardly conducive to voluntary action.

Even if the requisite voluntariness was present here, which Lake James denies, the Fourth Circuit believed that it was still required to determine whether "the interest promoted by its enforcement is outweighed by the public policy harms resulting from enforcement." Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 298 (4th Cir. 1998). The Fourth Circuit misapplied this balancing test, which it adopted from Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), by describing the governmental interest as a free choice of fire protection providers for citizens when no such unlimited right is available under North Carolina law, N.C. Gen. Stat. §69-25.11(4); by overlooking the fact that the control of Lake James had been wrested from the Board of Directors which caused the second (and much more protracted) of the two shutdowns upon which the Fourth Circuit placed such reliance in justifying the legitimacy of the County's concerns; by failing to mention the absence of any fire protection justification for either of the disputed provisions; and by omitting any reference to Commissioner Simpson's admission that the essential purpose of these provisions was to prevent Lake James from seeking access to the Courts. The Fourth Circuit's description of the disputed contract provisions as "narrowly tailored" to further the County's perceived interest is simply illogical given that the "no challenge" provision does nothing to facilitate legally appropriate territorial transfers. Finally, the Fourth Circuit gave absolutely no weight to and, in fact, never explicitly mentioned, the most

important interests favoring Lake James' position, which were the fact that the "consent" and "no challenge" provisions deprived the public of the services of the entity best positioned to resist unlawful territorial transfers and the fact that Burke County's position amounted to an attempt to immunize itself from liability for an unlawful territorial transfer which it had already approved. As a result, the Fourth Circuit simply misapplied the balancing test which it deemed appropriate.

Assuming that the Fourth Circuit has properly identified the test which should be used to analyze the validity of governmental attempts to condition the availability of benefits upon the renunciation of important federal constitutional rights, it should still be required to apply this test in a manner consistent with this Court's decisions. The Fourth Circuit's application of its preferred test is simply inconsistent with this Court's decisions and involves "an important question of federal law in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the United States Supreme Court. As a result, the Court should grant certiorari to review the Fourth Circuit's decision.

C. The Fourth Circuit erroneously concluded that an unconstitutional conditions claim is subject to a waiver defense.

The Fourth Circuit clearly held that waiver was a valid defense to Lake James' claim. In the event that the Fourth Circuit's decision does, in some way, amount to an application of the "unconstitutional conditions" doctrine, which Lake James denies, its apparent conclusion that waiver is a defense to an "unconstitutional conditions" claim is inappropriate given that recognition of such a defense would allow governments to do exactly what the

"unconstitutional conditions" doctrine is intended to prohibit. In fact, the entire purpose of the "unconstitutional conditions" doctrine is to provide a tool for analyzing the validity of governmental attempts to get other parties to forgo the exercise of certain federal constitutional rights. Lake James is not aware of any decision by a federal court of appeals recognizing the validity of a waiver defense in an "unconstitutional conditions" case.[18] On the other hand, the First, Third, and Sixth Circuits have decided that waiver is not a defense to such a claim. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985); Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987); G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994). As a result, the Fourth Circuit's apparent recognition of a waiver defense to an "unconstitutional conditions" claim is ~~"in~~ conflict with the decision of another United States court of appeals on the same important matter," Rule 10(a) of the Rules of the United States Supreme Court, and involves "an important question of federal law that has not been, but should be, decided by this Court." Rule 10(c) of the Rules of the United States Supreme Court. As a result, this Court should grant certiorari to review the Fourth Circuit's decision.

D. Assuming that waiver is a defense to an unconstitutional conditions claim, the Fourth Circuit erred by finding the alleged waiver at issue here to have been valid.

[18] The Ninth Circuit's decision in Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993), does not support the result apparently reached by the Fourth Circuit since that decision did not mention the "unconstitutional conditions" doctrine.

Assuming that waiver is a defense to an "unconstitutional conditions" claim, which Lake James denies, any such waiver of an important federal constitutional right must, at an absolute minimum, have been "voluntary, knowing, and intelligent." D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 185, 92 S.Ct. 775, _____, 31 L.Ed.2d 124, 134 (1992).[19] The Fourth Circuit never explicitly addressed the voluntariness of Lake James' purported waiver of its "unconstitutional conditions" claim in its opinion. Had it done so, the Fourth Circuit could not have deemed acceptance of the "consent" and no "challenge" provisions to have been to have been voluntary acts on the part of Lake James because they were part of a contract of adhesion presented to Lake James on a "take it or leave it" basis under circumstances involving significantly unequal bargaining power when exercise of Lake James' alleged right to choose not to execute the proposed contract would have meant its absolute extermination as a viable economic entity. By treating Lake James as having "voluntarily" waived its right to assert a constitutional claim against Burke County, the Fourth Circuit decided an important issue of federal law which should be resolved by this Court or decided an important question of federal law in a manner inconsistent with a decision of this Court. Rule 10(c) of the Rules of the United States Supreme Court. As a result, the Court should grant certiorari to review the Court of Appeals' decision.

E. The Fourth Circuit misapplied the balancing test which must be conducted in

[19]Assuming that waiver is a defense to an "unconstitutional conditions" claim and that the standard discussed in the text is, for some reason, inapplicable, this Court should determine the standard which should be used in evaluating the validity of such waivers.

"unconstitutional conditions" cases.

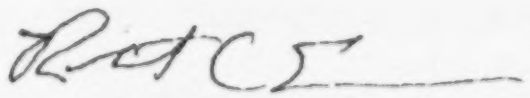
At the very end of its opinion, the Fourth Circuit attempted to conduct a balancing of the type required in "unconstitutional conditions" cases. The Fourth Circuit's analysis is fatally defective for a number of reasons. First, the Fourth Circuit described the relevant governmental interest as "the citizen's right to select a reliable fire department of their choice," Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 282 (4th Cir. 1998); no such unfettered right exists under North Carolina law. N.C. Gen. Stat. §69-25.11(4). Moreover, in weighing this purported governmental interest, the Fourth Circuit overlooked the undisputed record evidence tending to show the absence of any fire protection justification for the disputed contract provisions, the fact that Commissioner Simpson essentially admitted that the primary purpose of the disputed provisions was to prevent Lake James from seeking access to the courts, the fact that Lake James had passed all applicable inspections, and the fact that the directors who caused the second of the two shutdowns upon which the Fourth Circuit placed such heavy emphasis were no longer in control of Lake James. As if this error was not enough, the Fourth Circuit misapplied the other prong of the relevant balancing test as well. Instead of evaluating all relevant factors, including the benefits to be derived from Lake James' ability to point out and stop unlawful governmental actions (such as the invalidity of the Powerhouse Road and East Shores petitions), the Fourth Circuit merely focused upon and minimized Lake James' interest in its own continued existence, completely overlooking the fact that preventing Lake James from contesting improper territorial transfers would facilitate unlawful governmental action and diminish the adequacy of the fire protection provided to those individuals who took service from Lake James. As a result, the Fourth Circuit has

decided an important question of federal law in a manner inconsistent with prior decisions of this Court, Rule 10(b) of the Rules of the United States Supreme Court, and should be the subject of further review.

F. CONCLUSION

The Fourth Circuit's decision is worthy of certiorari review for many reasons. It has introduced an unfortunate lack of clarity into the law which should be applied in cases, such as this one, in which the availability of governmental benefits is conditioned upon the forfeiture of federal constitutional rights. It appears to have recognized a waiver defense to an "unconstitutional conditions" claim, an outcome rejected by every other federal court of appeals which has considered this issue. The Fourth Circuit has misapplied both its own preferred test for evaluating the issues presented by this case and the test which should be applied under the "unconstitutional conditions" doctrine. Finally, the Fourth Circuit has countenanced an egregiously unfair result. As a result, Lake James requests that a writ of certiorari issue to review the Fourth Circuit's decision.

Respectfully submitted, the 24th day of November, 1998.



Robert C. Ervin
Counsel of Record
Sam J. Ervin, IV
One Northsquare,
301East Meeting Street
Morganton, North Carolina 28655
(828) 243-9400

Supreme Court, U.S.
FILED

98 884 NOV 24 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term 1998

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INCORPORATED,
Petitioner,

v.

BURKE COUNTY, NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Robert C. Ervin
Counsel of Record
Samuel J. Ervin
BYRD BYRD ERVIN WHISNANT MCMAHON & ERVIN P.A.
301 East Meeting Street
One Northsquare
Post Office Drawer 1269
Morganton, North Carolina 28680-1269
(828) 437-4220

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered July 15, 1998 ..... App. 1

Memorandum and Order
United States District Court
for the Western District of North Carolina
entered May 13, 1997 ..... App. 13

Judgment,
United States District Court
for the Western District of North Carolina
entered May 13, 1997 ..... App. 33

Order,
Petition for Rehearing
with Suggestion for Rehearing In Banc,
United States Court of Appeals
for the Fourth Circuit
entered August 26, 1998 ..... App. 37

Contract
Between Burke County and The Lake James
Community Volunteer Fire Department, Inc.
dated February 27, 1996 ..... App. 38

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1815

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INCORPORATED,
Plaintiff-Appellee,

v.

BURKE COUNTY, NORTH CAROLINA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of North Carolina, at Shelby.
Lacy H. Thornburg, District Judge.

(CA-96-177-4-T)

Argued: March 4, 1998
Decided: July 15, 1998
Entered: July 15, 1998

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and CLARKE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Wilkinson and Senior Judge Clarke joined.

COUNSEL

ARGUED: Jim D. Cooley, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina, for Appellant. Robert Crawford Ervin, BYRD, BYRD, ERVIN, WHISNANT, MCMAHON & ERVIN, P.A., Morganton, North Carolina, for Appellee. **ON BRIEF:** W. Clark Goodman, Katherine T. Lange, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina, for Appellant.

OPINION

NIEMEYER, Circuit Judge:

We must decide whether to enforce an agreement made by a volunteer fire department not to sue a county for approving the transfer of certain fire protection areas to other fire departments. The district court refused to enforce the agreement as an unconstitutional condition requiring the fire department to waive its First Amendment right to petition the government. Because the agreement was entered into voluntarily, with the advice of counsel, and was in the public interest, we conclude that it is enforceable. Accordingly, we reverse and remand for further proceedings.

I

Lake James Community Volunteer Fire Department, Inc., is a North Carolina non-profit corporation organized to provide volunteer fire services in a rural area fire district pursuant to a contract with Burke County, North Carolina, and Chapter 69, Article 3A, of the North Carolina General Statutes (regulating fire protection in rural areas). Under North Carolina law, residents living outside cities or towns may vote to establish a fire protection district within their

county by voting to pay a modest tax to the county for fire protection services in the district. See N.C. Gen. Stat. § 69-25.1. The county must thereafter provide fire protection to the fire protection district by (1) contracting to do so with the fire department of an incorporated city or town, with a non-profit volunteer fire department, or with the Department of Natural Resources and Community Development; (2) furnishing fire protection through its own fire department; or (3) a combination of the various options. See N.C. Gen. Stat. § 69-25.5. Any geographical change to an established fire protection district, whether by expansion or contraction, may be effected by a petition signed by two-thirds of the real property owners affected and must be approved by the fire protection commissioners of the district, the fire department under contract, and the county commissioners. See N.C. Gen. Stat. § 69-25.11.

Beginning in 1969, the Lake James Community Volunteer Fire Department (the "Fire Department") provided fire protection to the Lake James Fire District in western Burke County (the "County") pursuant to a contract with the County. But in June 1994, the firefighters at the Fire Department turned in their gear and refused to provide any fire protection services. This walk-out was prompted by an intra-corporate dispute within the Fire Department's board of directors. Burke County promptly made arrangements with three neighboring fire departments -- West End Fire Department, Oak Hill Fire and Rescue Protection Association, and the Town of Glen Alpine Fire Department. After eight days, the firefighters returned to duty, and the County and the Fire Department entered into a new 20-year fire protection services contract dated July 19, 1994. This 1994 contract provided that either party could terminate the contract, provided it gave 90-days' prior written notice.

The internal dispute within the Fire Department's board continued even after the 1994 contract was signed, leading to the board of directors' decision to disband the Fire Department and recommend dissolution of the Lake James

Fire District. In March 1995, the Fire Department sent a letter to the County, stating:

> Due to continuing problems with training, readiness and maintenance of equipment within the Lake James Community Fire Department, the Board of Directors of the Lake James Community Volunteer Fire Department voted today to void it's [sic] contract for fire service with Burke County, effective immediately. We ask the County to split the Lake James Community Fire District to provide fire protection to all od [sic] our residents.

In giving this notice, the Fire Department did not honor the 90-days' prior written notice provision of its 1994 fire protection contract with the County.

Burke County officials immediately made emergency calls to neighboring fire departments to obtain oral commitments for fire protection in the Lake James Fire District, and thereafter, in early April 1995, the County entered into three temporary service contracts, again with the West End, Oak Hill, and Glen Alpine fire departments. In August 1995, the County entered into long-term contracts with those departments, partitioning the Lake James Fire District among them.

In the wake of the Fire Department's actions, citizens in several defined areas of the Lake James Fire District submitted petitions to the County to transfer fire protection coverage from the Lake James Fire District to neighboring fire districts. The County received petitions from areas known as Holiday Shores, Powerhouse Road, and East Shores. The County Board of Commissioners approved the petitions, concluding that in each case the necessary two-thirds of the property owners approved the transfer. Holiday Shores transferred from the Lake James Fire District

to the West End Fire District, while both Powerhouse Road and East Shores transferred to the Glen Alpine Fire District.

During this same period, the Fire Department circulated a plan of dissolution to its members. But after a complicated and messy attempt to dissolve failed, the Fire Department's directors who had voted to terminate its fire protection contract with the County resigned. In November 1995, new directors of the Fire Department began taking steps to revive the Fire Department and to open negotiations with the County for a new fire protection services contract. Because of the prior history and service interruptions, however, the County insisted that any contract with the Fire Department include a "Consent Provision" which required that the Fire Department agree "to allow" citizen groups to petition for transfer to other fire districts and that "any consent required by Chapter 69 with regard to such a petitioning process shall be presumed to have been given" by the Fire Department. The County also insisted on a provision that if the Fire Department reneged on its consent or "challenge[d] in the judicial system or otherwise the legality of the above-referenced Consent Provision," it would be breaching the contract. Although the Fire Department objected to these provisions as unconstitutional, the County insisted on them.

The Fire Department, acting on the advice of counsel, agreed to these terms and signed a contract with the County on February 26, 1996. When it returned the signed contract to the County, however, the Fire Department also enclosed a letter in which it again objected to the provisions, contending that they violated the Right to Petition Clause of the First Amendment and the analogous Open Courts Clause of the North Carolina Constitution. The letter stated that the Fire Department was forced "to choose between executing a contract which contains these unconstitutional provisions and going without any contract." The new contract was executed by both parties and became effective March 1, 1996.

In July 1996, the Fire Department filed this action, asserting a veto right granted to contracting fire departments under Chapter 69 of the North Carolina General Statutes and demanding that the County's approval of two of the three citizens' petitions granted by the County -- the Powerhouse Road Petition and the East Shores Petition -- be vacated. The County defended the suit, contending that the Fire Department had agreed to these petitions in its 1996 contract and had waived its right to challenge them in court. It also filed a counterclaim to declare the Fire Department in breach of the 1996 contract.

On cross-motions for summary judgment, the district court held that the no-challenge provision in the 1996 contract was void as an unconstitutional condition. It concluded that the provision unreasonably infringed upon the Fire Department's right to petition the government since the provision did not serve any legitimate fire-protection purpose. As a result, the court vacated the County's approval of the Powerhouse Road and East Shores petitions. Finally, the court denied the County's motion for a summary judgment declaring the Fire Department in breach of the 1996 contract. This appeal followed.

II

The question in this case is whether the Fire Department's agreement to consent to citizens' petitions and not to challenge them in court is enforceable. Any response to this question draws on the common-law contract principle that a contract will be enforced unless the interest promoted by its enforcement is outweighed by the public policy harms resulting from enforcement. See Town of Newton v. Rumery, 480 U.S. 386, 392 & n.2 (1987); Restatement (Second) Contracts § 178(1) (1981). Moreover, simply because a contract includes the waiver of a constitutional right does not render the contract per se unenforceable. See, e.g., Rumery, 480 U.S. at 397; D. H. Overmyer Co. v. Frick

Co., 405 U.S. 174, 185 (1972). But a waiver of constitutional rights in a contract might well heighten the scrutiny of its enforceability because the law does not presume the waiver of constitutional rights. See Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937). The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable. See Overmyer, 405 U.S. at 187; Rumery, 480 U.S. at 398; Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Under these principles, courts have routinely enforced voluntary agreements with the government in which citizens have, for example, given up the right to sue through releases and covenants not to sue the government, see Rumery, 480 U.S. at 397-98; the right to speak regarding government secrets through confidentiality agreements, see Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam); the right to a jury trial through agreements to submit litigable disputes exclusively to arbitration, see AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648-49 (1986); McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994); the waiver of a jury trial in government contract cases, Leasing Serv. Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986); and the right to trial with its concomitant right to confront witnesses through plea agreements, see Brady v. United States, 397 U.S. 742, 755 (1970); Rumery, 480 U.S. at 393; cf. Overmyer, 405 U.S. at 187 (the right to notice and hearing between private parties through cognovit clauses).

In Rumery, for example, Rumery was arrested by the Town of Newton for witness tampering arising out of Rumery's conversations, on behalf of a friend, with a witness who was planning to testify against the friend on a sexual assault charge. When Rumery threatened to sue town officials based on the allegedly illegal arrest, the officials and Rumery entered into an agreement under which Rumery agreed to release the officials for liability in exchange for their dropping the charges against him. When Rumery later

brought a federal suit against the public officials under 42 U.S.C. § 1983, the officials pleaded the release agreement. Rumery contended that the agreement was unenforceable as against public policy because it required him to waive his right to sue under § 1983. In rejecting this argument, the Supreme Court stated:

> Because Rumery voluntarily waived his right to sue under § 1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid.

Id. at 394 (emphasis added); see also Bushnell v. Rossetti, 750 F.2d 298, 301 (4th Cir. 1984); cf. Overmyer, 405 U.S. at 187 (enforcing provisions in a private contract waiving Fourteenth Amendment rights of notice and hearing).

Applying these principles to this case, it would appear that the Fire Department entered into the contract with the County knowingly and intelligently; that it did so voluntariiy; and that its waiver of the statutory right to challenge fire district transfers does not undermine the relevant public interests.

The pertinent provisions of the 1996 contract between the County and the Fire Department were largely the product of two walk-outs by the Fire Department and of the County's need to ensure that its citizens have reliable fire protection. These historical circumstances undoubtedly put the Fire Department in a weak negotiating position for opposing the County's desire to give greater effect to citizens' petitions for alternative fire protection. But the record remains undisputed that the Fire Department was fully aware of what it was waiving and that it voluntarily signed the agreement. Indeed, both before and after executing the agreement, the Fire Department asserted that the waivers involved constitutional rights protected by the First Amendment and the North Carolina analogue.

Moreover, the Fire Department's decision to sign was made with the advice of counsel.

While the record shows that the Fire Department protested the difficult choice it had to make, it voluntarily executed the contract. In the letter which it sent with the contract, it stated that it had been forced to choose between executing the contract and going without a contract. By executing and returning the contract, it clearly made that difficult choice. But making a choice rendered difficult because of a weak bargaining position of its own creation does not render the execution of the contract involuntary.

Moreover, the limited waiver that the Fire Department gave was not adverse to public policy. On the contrary, it was necessary to reestablish the Fire Department's good faith through effective fire protection and not through the exercise of a statutory veto right. Effective and reliable fire protection service is by definition in the public interest, and when that service becomes unreliable, the public justifiably has an interest in contracting with someone dependable. Giving effect to the public will about its choice of fire departments is consistent with, and not adverse to, the strong public policy of providing efficient and reliable fire protection to the community.

In addition, the County narrowly tailored the Fire Department's waiver of the right to sue in court to give effect to the Fire Department's agreement to consent to the citizens' petitions. Only to the extent that the Fire Department agreed to consent to the citizens' petitions did the Fire Department waive its right to sue.

Also, by agreeing to the consent provision and waiving its right to challenge it in court, the Fire Department did not give away anything that it had prior to entering into the 1996 contract. The Fire Department had voluntarily abandoned its 1994 contract with the County by illegally terminating it, and it did so with no prior notice to the County. When the Fire Department later changed its mind about its decision to dissolve, it had no right, constitutional

or otherwise, to be the County's supplier for fire protection. It also had no statutory right at that time to veto the transfer of areas within the Lake James Fire District to other fire protection districts because that veto right is given by statute only to fire departments under contract with the County. Thus, when the County insisted during negotiations that the Fire Department agree not to exercise its statutory veto right, the County demanded nothing that it did not then have. The County could just as well have continued with its arrangements with the other three neighboring fire departments and refused altogether to contract with the Fire Department.

In these circumstances, we conclude that the consent provision and the related agreement not to challenge the consent provision in the 1996 contract between the Fire Department and the County were made knowingly and voluntarily and did not, through their enforcement, undermine the relevant public interest. They are therefore enforceable. See Leonard v. Clark, 12 F.3d 885, 890 (9th Cir. 1993) (union's voluntary execution of labor agreement waived its right to object to narrowly-tailored clause allegedly infringing upon free speech); Berry v. Peterson, 887 F.2d 635, 641 (5th Cir. 1989) (covenant not to sue made by inmate enforceable because voluntary and not contrary to public policy).

The Fire Department argues that the agreement not to challenge the citizens' petitions violates the "unconstitutional conditions" doctrine as articulated in Perry v. Sinderman, 408 U.S. 593 (1972). In Perry, the Supreme Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech," even if the person has no entitlement to the benefit. Id. at 597; see also Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2347 (1996). In Perry, the Court noted that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are

some reasons upon which the government may not rely." 408 U.S. at 597. That principle, however, does not categorically preclude parties from negotiating contractual relationships that include waivers of constitutional rights such as a covenant not to sue.

Even under the unconstitutional conditions doctrine, the condition that a person give up his constitutional rights is balanced against the government's interest in promoting the efficiency of public services. See Umbehr, 116 S. Ct. at 2347-48. And with that balancing, the public interest in the circumstances of this case weighs heavily in favor of the citizens' right to select a reliable fire department of their choice. The Fire Department had abandoned its fire protection duties twice before, leaving the citizens in the Lake James Fire District without fire protection and requiring the County to react on an emergency basis. After the first time, the County resumed its relationship with the Fire Department only after insisting on a clause requiring the Fire Department to give 90-days' prior written notice of termination. But notwithstanding the inclusion of that clause, the Fire Department again violated its agreement in March 1995, abandoning without notice its duty to provide fire protection. In negotiating a third contract with the Fire Department, the County had a compelling interest in insisting that the citizens be given the freedom of choosing whether to rely on the Fire Department's promises and in seeking finality to an ongoing dispute which had recurrently interrupted fire protection services. The no-challenge agreement goes no further than this. Left with the real risk of public injury, the County thus voted the public interest by including the covenant not to sue. It is true that the Fire Department had an interest in its continued existence to provide fire protection to the Lake James Fire District, but that interest would only have meaning if the Fire Department were willing to provide reliable and uninterrupted fire protection.

The Fire Department's argument against enforcement of the 1996 contract based on the North Carolina Constitution's Open Courts Clause, Article I, § 18, is rejected for the same reasons we reject its argument based on the United States Constitution. North Carolina recognizes, as do the parties, that North Carolina's constitutional rights may be waived under circumstances similar to those justifying waiver of a federal constitutional right. See, e.g., State v. Petersilie, 432 S.E.2d 832, 840 (N.C. 1993).

For the foregoing reasons, we reverse the district court's conclusion that the waiver provisions of the 1996 contract are unenforceable. Because we conclude that they are enforceable, we also reverse the district court's order vacating the County's approval of the citizens' petitions transferring areas of the Lake James Fire District, and we vacate its order granting summary judgment to the Fire Department on the County's counterclaim. We remand the case for further proceedings in light of our holdings.

REVERSED AND REMANDED

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
SHELBY DIVISION

CIVIL NO. 4:96CV177

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INC.,

Plaintiff,

vs.

COUNTY OF BURKE,

Defendant.

Entered: May 13, 1997

MEMORANDUM AND ORDER

THIS MATTER is before the Court on Defendant's Motion for Summary Judgment, and Plaintiff's Motion for Partial Summary Judgment, both filed March 31, 1997. Having considered those Motions and the Responses filed by the Parties, the Court will grant summary judgment for the Plaintiff on all claims.[1]

I. INTRODUCTION AND BACKGROUND

In this action, Plaintiff, the Lake James Community Voluntary Fire Department, Inc., ("the Department"), challenges Defendant County of Burke's ("the County's")

[1] Defendant's request for a hearing on the summary judgment motions is denied. The issues in this case have been properly identified in the filings of the parties and through prior hearings before the Court concerning preliminary relief.

transfer of two portions of the Lake James Fire District to the Glen Alpine Fire District, and further seeks to enjoin Defendant from using that challenge as a basis for terminating its contract with Plaintiff. Defendant filed a counterclaim seeking to have Plaintiff declared in breach of contract for having brought those challenges in court.

Plaintiff is a non-profit corporation that provides fire protection services in the Lake James Fire District, located in western Burke County, North Carolina. The Department provided those services from 1969 until March 23, 1995, when a majority of the Plaintiff's Board of Directors voted to cease providing services. In response, the County made arrangements with fire departments in three adjoining fire districts to provide fire protection services within the Lake James District. In July 1995, individuals within the Powerhouse Road area contacted the County about initiating a petition pursuant to North Carolina General Statute § 69-25.11(4) to transfer that area from the Lake James Fire District to the Glen Alpine Fire District, thereby allowing the Town of Glen Alpine to provide it with fire protection services. The County prepared the petition, and the individuals set about obtaining the signatures of two-thirds of the owners of the territory to be transferred, as required by N.C. Gen. Stat. § 69-25.11(4).

The Lake James Department Directors who had voted to suspend service subsequently resigned from their positions, and, on November 11, 1995 new Directors began taking steps to reopen the Department. The Powerhouse Road petition was delivered to the Burke County Board of Commissioners at a meeting held November 21, 1995. Prior to that meeting, petition opponents submitted the signatures of 13 persons seeking to withdraw from the petition, and proponents submitted names to be added. At the November meeting, the Board scheduled a hearing on the petition to be held December 19, 1995, and established December 7, 1995, as the date by which signatures could be added or withdrawn from the petition. Subsequent to December 7, the County

concluded that 154 of 228 eligible owners had signed the transfer petition. On December 18, 1995, Plaintiff delivered a letter to County Fire Marshall Kevin Stewart indicating that certain property owners, including Melissa M. Russell and three non-profit churches, had been left off the list of persons eligible to sign the petition. Letter from Robert C. Ervin to Kevin Stewart, Exhibit E to Complaint, *attached to* Notice of Removal, filed July 22, 1996 (hereinafter "Complaint"). Those four property owners did in fact own plots within the area to be transferred. See deeds, Exhibits G and F to Complaint. On December 19, another letter was sent to Defendant setting forth additional property owners who had been improperly left off the list of eligible signatories. Exhibit H to the Complaint. Over objections that insufficient signatures had been obtained, Defendant's Board voted on December 19, 1995, to transfer the Powerhouse Road territory from the Lake James Fire District to the Glen Alpine Fire District, effective July 1, 1996.

Following the transfer vote, in January of 1996, the parties negotiated a contract ("the Contract") by which Plaintiff agreed to provide fire protection services within the County's Lake James Fire District. The contract contained a provision (the "no-challenge" provision) that called for its termination upon the Plaintiff's bringing any challenge to the legality of fire tax district line transfers becoming effective after June 29, 1996. Contract, Exhibit K to Complaint. The contract became binding February 27, 1996, and the Plaintiff resumed providing fire protection services in the Lake James Fire District on or about March 1, 1996.

On January 29, 1996, the County was contracted by persons seeking a petition to transfer a second portion of the Lake James Fire District into the Glen Alpine Fire District (hereinafter the "East Shores Petition"). The East Shores petition proposed to transfer an area that prior to the Powerhouse Road transfer was located completely within the Lake James Fire District and did not adjoin the Glen Alpine Fire District. See Exhibits P and Q to Amended Complaint,

filed December 11, 1996. East Shores petition proponents collected signatures and delivered the signed petition to the County Board. At its August 20, 1996, meeting, the Board voted to hold a hearing on the petition. The Board set September 6, 1996, as the deadline for the addition and deletion of signatures, and September 12 as the cut-off date by which any challenges to the petition's signatures had to be made. The Burke County Board of Commissioners held the East Shores petition hearing on September 17, 1996, and at that meeting voted to approve the requested transfer.

The Department originally brought this action in the General Court of Justice, Superior Court Division, Burke County, North Carolina (96 CVS 835). Defendant filed a notice of removal July 22, 1996. Plaintiff, in its Complaint and Amended Complaint, has set out claims for declaratory and injunctive relief, seeking to void the no-challenge provision of the Contract and to set aside the County's approval of the Powerhouse Road and East Shores petitions. Defendant has counterclaimed to have the no-challenge provision enforced. Plaintiff filed for summary judgment on claims relating to the validity of the two transfers, while Defendant filed for summary judgment on all remaining claims relating to the validity of the no-challenge provision.

II. STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists if a reasonable jury considering the evidence could return a verdict in favor of the non-moving party. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Where the parties have cross-moved for summary judgment, the Court will consider each motion separately. Thus, in considering the Plaintiff's motion, Plaintiff as the

moving party has an initial burden to show a lack of evidence to support Defendant's case. *Shaw, supra* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). This showing does not require the Plaintiff to prove the absence of a genuine issue of material fact but only to note its absence. *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021, 1025 (N.D. W. Va. 1996) (citing *Celotex Corp., supra)*. If this showing is made, the burden then shifts to the Defendant who must convince the Court that a triable issue does exist. *Shaw, supra*. Such an issue will be shown "if the evidence is such that a reasonable jury could return a verdict for the [plaintiff]." *Id.* A "mere scintilla of evidence" is not sufficient to defeat summary judgment. *Id.* After consideration of the Plaintiff's motion, the same procedure is used in connection with Defendant's motion for summary judgment.

Thus, in considering the facts of the case for purposes of this motion, the Court will view the pleadings and material presented in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

III. DISCUSSION

Plaintiff's position is this: Defendant is attempting to use an unconstitutional contractual provision (the "no-challenge provision") to bar Plaintiff from challenging Defendant's improper approval of two petitions to transfer territory from the Lake James Fire District. Once the no-challenge provision is set aside, contends Plaintiff, the Defendant's erroneous petition approvals must be reversed and the territory removed from the District replaced. Defendant argues that the no-challenge provision is valid, and as such, prevents Plaintiff from attacking Defendant's approval of the transfer petitions here challenged. Even if the no-challenge provision were found ineffectual,

Defendant maintains that the petition approvals were valid and this must be upheld.

A. The No-Challenge Provision

The first question before the Court is whether the no-challenge provision prevents Plaintiff from contesting Defendant's transfer petition approvals. The contract provides that:

> should the Lake James Community Volunteer Fire Department, Inc....challenge the legality of any of the changes in the Fire Tax District lines under N.C.G.S. § 69-25.11 taking place effective as of or after June 30, 1996, then the parties agree any such actions will constitute a material breach of this Contract resulting in immediate termination....

See Contract, Exhibit K *attached to* Complaint.

Plaintiff contends the provision is void because the County government, by including it, attached an "unconstitutional condition" on the granting of a benefit or right. Defendant rejoins that the no-challenge provision is a valid contractual waiver of a constitutional right. Having reviewed the arguments and caselaw presented by both parties, the Court concludes that the no-challenge provision, by conferring a benefit conditioned on the abandonment of Plaintiff's First Amendment right to petition the government for a redress of grievances, is void as an unconstitutional condition.

"Unconstitutional conditions, which make enjoyment of a government benefit contingent on sacrifice of an independent constitutional right, are *prima facie* invalid." *Rosenburger v. Rector and Visitors of University of Va.*, 18 F.3d 269, 280 (4th Cir. 1994), *rev'd on other grounds*,

____U.S.____, 115 S. Ct. 2510 (1995). The United States Supreme Court

> has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (substitution original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

In considering whether the government has imposed an unconstitutional condition, a court must begin with the threshold question of whether the "condition" denies a constitutionally protected right. *Rosenburger* 18 F.3d at 280. Here, the no-challenge provision prevents Plaintiff from challenging the Defendant's fire district transfer petition process. It thus works to limit Plaintiff's First Amendment right to petition the government for a redress of grievances, a right that has been construed to include access to the courts. *Hudson v. Palmer*, 468 U.S. 517 (1984); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Maryland Public Interest Group v. Elkins*, 565 F.2d 864, 866 (4th Cir. 1977), *cert. denied*, 435 U.S. 1008 (1978). While the right to so petition does not encompass lawsuits

addressing purely personal concerns, see *Baker v. Mecklenburg County*, 853 F. Supp. 889 (W.D.N.C. 1994), *aff'd* 48 F.3d 1215 (unpublished), 1995 WL 86436 (4th Cir. 1995) (per curiam); *Day v. South Park Independent School Dist.*, 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); see also *Connick v. Myers*, 461 U.S. 138 (1983); the no-challenge provision here targeted Plaintiff's right to contest the Defendant government's handling of public petitions to transfer fire-tax jurisdictions within the County. The Court finds that such petitions and transfers are incontrovertibly "public concerns." Plaintiff's interest in the outcome of such matters hardly makes them less public: all citizens of Burke County have an interest in seeing fire protection jurisdictions (and fire tax revenues) allocated effectively and efficiently, and in accordance with the law. Because the no-challenge provision limits the Plaintiff's right to petition for redress concerning such civic matters, it restricts Plaintiff's constitutional rights. As an independent contractor, Plaintiff has standing to challenge Defendant's use of that constitutional restriction to terminate it. *Bd. of County Com'rs, Wabaunsee County v. Umbehr*, ___ U.S. ___ 116 S.Ct. 2342 (1996).

To assess whether a contractual condition is unconstitutional, the Court must determine if the restriction represents:

> "a balance between the interests of the [independent contractor], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its [independent contractors]."

United States v. Nat'l Treasury Employees Union, 513 U.S. 454, ___, 115 S.Ct. 1003, 1013 (1995) (quoting *Pickering v.*

Bd. of Ed. of Township High School Dist., 391 U.S. 563, 568 (1968)).[2]

Here, the Department has an obvious individual interest at stake in commenting upon these matters of public concern -- the no challenge provision bars it from protesting the legality of potentially malfeasant Fire Tax District line changes that might put the Department out of business. This restriction on the Department, in turn, poses even more significant implications for the wider public: by restraining the Department, the no-challenge provision deprives the general Burke County citizenry from having their government monitored by those "who are often in the best

---

[2] "Inquiry into potentially unconstitutional conditions cannot be avoided on the ground that the employees waived their constitutional rights by applying for employment, because that would eviscerate the Court's opinions establishing a balancing standard." *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987); see *G & V Lounge, Inc. v. Michigan Liquor Control Com'rs*, 23 F.3d 1071 (6th Cir. 1994). Almost all of the cases cited by Defendant in support of a "waiver" analysis are inapplicable here because they do not involve the *government* conditioning a benefit on the recipient's repudiation of some constitutional right. E.g., *D. H. Overmyer Co., Inc., of Ohio v. Flick Co.*, 405 U.S. 174 (1972). Insofar as *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), holds that the Supreme Court's unconstitutional conditions balancing test should be replaced by a waiver inquiry, this Court respectfully declines to follow that decision. However, the fact that Defendant is the sole-source provider of a bargained-for benefit with far more leverage than the Plaintiff, would lead this Court under a waiver analysis to conclude that the Department's concession was made as part of a contract of adhesion and was not voluntary, knowing or intelligent. *Cf. Overmyer*, 405 U.S. at 186 (limiting waiver finding from cases where restrictions are included in contracts of adhesion or as part of a take-it-or-leave-it offer made by party with far greater bargaining power); *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988). Even if the waiver were *prima facie* valid, enforcing it would run contrary to public policy favoring government accountability in the absence of some demonstrated countervailing interest. Cf. *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1398 (9th Cir.), *cert. denied*, 501 U.S. 1252 (1991). As discussed *infra*, the Defendant has failed to articulate any fire-protection rationale served by the no-challenge provision.

position to know what ails the agency for which they work." Umbehr, ___ U.S. at ___, 116 S. Ct. at 2347. In the arena of fire district line drawing, the no-challenge provision muzzles the very watchdog most like to seek redress for improper governmental activity.

The County's interest, by contrast, is said to be "ensuring consistently reliable fire protection for its citizens," which "necessarily includes the protection of the public's expectation to choose, subject to County approval, which fire district would best serve their needs." Defendant's Memorandum at 7. This choice is said to be particularly important because the Department has ceased to provide fire protection without warning twice before. But the North Carolina legislature has already severely limited the "public's expectation to choose" by providing that such transfers can only be made by a county board of commissioners after receiving favorable recommendations (i.e., the consent) from the directors of the entities furnishing fire protection in the affected districts. See N.C. Gen. Stat. § 69-25.11(4). Moreover, the County has failed to link any residual "expectation" with reliable fire protection, and more to the point, has wholly failed to produce evidence tending to show that challenges to the *legality* of fire territory transfers have led or would lead to reduced fire-service reliability. As indicated by the use of preliminary relief in this case, the Court is inclined to believe that legal action surrounding fire district transfers would not reduce reliability in any appreciable way. By contrast, Plaintiff has provided evidence indicating that the no-challenge provision served no legitimate fire-protection end. Neither the County's Fire Marshall nor the director of Emergency Services could discern any reason related to fire protection for inclusion of Contract paragraph 11(b)(iv) and, thus, the no-challenge provision it contains. See, respectively, Kevin Stewart Deposition at 80, Clint Patton Deposition at 67-68, filed March 31, 1997. Similarly, the statements of County Commissioner Simpson, while addressing a related consent

provision, do nothing to explain how the no-challenge provision might lead to better fire protection. See James Reid Simpson Deposition at 23-27, *attached to* Defendant's Memorandum. In contrary fact, Simpson proposed the no-challenge provision to prevent the Department from challenging the *contract* in court because

> it appeared. . . that a lot of the issues concerning this fire department were being taken to the judicial system and that all the folks involved were spending a lot of their own money or fire tax money or other public funds using the judicial system as a forum in which their disputes could be at least made public if not settled.

Id., at 25.

Simpson's comments verify that fire service "reliability" was not the County's sole concern. If it had been, terms limiting the Department's ability to challenge the contract, circumscribing its ability to strike, or specifying the County's remedies following any such strike could have been drafted easily enough. But the County did not draft such limiting language. Instead, it included a provision muting the Department's ability to challenge petitions or votes to change fire tax lines becoming effective after June 1, 1996. Notably, at the time the County included that "waiver" language, it was presumably aware that the procedure used in the Powerhouse Road transfer was inconsistent with North Carolina law. See "Instruction to Petitioners Requesting the Expansion of a Fire Tax District Area," *attached to* Burke County "Recommended Policy for Fire Protection District Expansion" (January 17, 1984) ("tax exempt status of the owner of a piece of property does not render that owner's signature ineligible [sic] to sign the Petition"), Exhibit N to Complaint.

It appears manifest that, rather than fire-protection, the no-contest provision was designed to promote the County's ability to be free from having the legality of its fire district transfers challenged. The provisions' breadth is made no less jarring by the County's observation that the terms employed could have been broader still. This Court's inquiry is not whether the terms used were the broadest possible; it is, rather, whether the terms used balanced the Plaintiff's rights in commenting upon matters of public concern and the interest of the County, as an employer, in promoting the efficiency of the public services performed through the Department. *National Treasury Employees Union*, 513 U.S. at ___, 115 S.Ct. at 1013. The terms here did not promote efficient public service, but instead simply limited Plaintiff's First Amendment right to seek redress for grievances addressing matters of public concern. Thus imbalanced, the no-challenge provision imposed unconstitutional conditions on receipt of a government benefit, and as a consequence must be declared void.

Because there are no material issues of fact concerning the validity of the no-challenge provision and because Plaintiff is entitled to judgment as a matter of law, the Court will grant summary judgment on this issue to the Plaintiff.

B. The Petitions

Having held the no-challenge provision ineffectual, the Court turns to consider whether the County's contested transfers of territory from the Lake James Fire District to the Glen Alpine Fire District complied with North Carolina General Statute 69-25.11(4). That statute prescribes the means by which a board of county commissioners may transfer territory between "adjoining fire districts." N.C. Gen. Stat. §69.25.11(4). The county commissioners may only consider such a transfer:

> *upon petition of two thirds of the owners of the territory involved* and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected.

Id. (emphasis added). After receiving such petition, a board must give notice of and hold a public hearing on the petition; and such "hearings may be adjourned from time to time and no further notice is required of such adjourned hearings." *Id.* Only after these prerequisites are met may the county board then:

> transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper.

Id.

The North Carolina Attorney General has provided guidance for interpreting two terms used in N.C. Gen. Stat. § 69.25.11. First, property "completely separated from the existing fire district is not 'adjoining territory' within the meaning of the statute." Opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981) interpreting N.C. Gen. Stat. § 69.25.11(1)). Second, the term "owner" means "any owner, whether or not resident," *id.*, that is whether or not the owner resides at the property.

As will appear, the County's approval of petitions to transfer the Powerhouse Road and East Shores territories from the Lake James Fire District to the Glen Alpine Fire District did not comply with North Carolina General Statute 69-25.11(4). The two petitions are considered in turn.

The County voted to accept the Powerhouse Road petition based on the submission of 154 signatures from a list of 228 eligible property owners (the County understood that 152 signatures constituted the two-thirds minimum needed to propose the transfer). See Petition Signature List, Exhibit C to Complaint. One day prior to the hearing and vote on that petition, Plaintiff submitted a letter to County of Burke Fire Marshall Kevin Stewart indicating that certain owners of property in the territory involved in the transfer had been left off the list of eligible voters. See Robert C. Ervin letter to Kevin Stewart (December 18, 1995), Exhibit E *attached to* Complaint. The property owners left off the list included Melissa M. Russell and three churches, the Ebenezer Baptist Church, St. Paul's Church and River Valley Baptist Church. *Id.* Plaintiff argues that these four property owners should have been included in the list of eligible signatories, which would bring the total number of eligible signatories to 232 and thereby bump the required two-thirds figure to 155.[4] Because Defendant approved the petition on submission of only 154 signatures, Plaintiff contends that the transfer was invalid under N.C. Gen. Stat. § 69-25.11(4). The County argues that the owners were properly excluded.

The Court first considers the three churches. Rather than deny that the churches in fact own property in the area to be transferred, the County would omit them from the list of property owners eligible to sign fire district transfer petitions solely because these entities pay no property taxes. The statute, however, speaks only of property "owners" and includes no tax-paying limitation. The Court will not engraft additional terms onto perfectly clear statutory language, *see State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974), especially where the County itself formerly understood this to be the statute's plain meaning. See "Instructions to Petitioners Requesting the Expansion of a Fire Tax District Area," attached to Burke County "Recommended Policy for

[4] Two-thirds of 232 is 154.67.

Fire Protection District Expansion" (January 17, 1984), *supra* (stating that tax-exempt status does not make a property owner ineligible to sign a petition). Under the statute, the three churches were entitled to be counted as property owners.

> So, too, was property owner Russell. According to the County, she:
>
> > was not included on the list of eligible property owners because the County had previously determined from discussion with proponents of the Petition that, although her property was geographically contained within the territory subject to the Powerhouse Road Petition, it was not possible to move her into a new fire district because the only access to her property in case of a fire was over a right of way through property and roads within the Lake James Fire District.

Defendant's Memorandum Opposing Summary Judgment, at 4 (citing affidavits).

This argument runs contra to the text of N.C. Gen. Stat. § 69-25.11(4), which simply states a petition must include two-thirds of "the owners of the territory involved." The Powerhouse Road petition proponents drew the lines defining "the territory involved" in the transfer, and, as the County concedes, that demarcation "geographically contained" Russell's property. Significantly, the County does not contend that the property was *bisected* by the proposed line (an argument made concerning other property); instead it argues that the County was within its rights to exclude the wholly contained property for practical reasons of fire-protection. Understandable as that rationale may be, N.C. Gen. Stat. 69-25.11(4) affords no consideration of it in calculating property owners *eligible* to sign a fire

district transfer petition. The statute *does* allow a County board to relocate boundary lines "in such . . . manner as the board may deem proper" (i.e., not in conformance those proposed in a petition) *once* a valid petition, with the requisite signatures, has been received. That the General Assembly specifically granted such fire-protection line drawing discretion *after* a county has complied with enumerated petitioning prerequisites indicates that its failure to grant prepetition discretion was equally precise. The County can exclude Russell's property from the transfer area once a valid petition has been accepted; it cannot exclude her property to make an invalid petition acceptable. The County's exclusion of Russell's name from the list of eligible signatories therefore contravened the dictates of N.C. Gen. Stat. 69-25.11(4).

Had the County included Russell and the three churches, total number of owners eligible to sign the petition would have increased to 232, with the two-thirds requirement bumped to 155 signatures.[5] Because only 154 signatures were garnered, the County did not comply with the statutory provisions of N.C.G.S. § 69-25.11, and the transfer was thus ineffective. See *Knotsville Volunteer Fire Dep't, Inc. v. Wilkes County*, 85 N.C. App. 598, 355 S.E.2d 139, *disc. rev. denied* 320 N.C. 632, 360 S.E.2d 89 (1987).

Because transfer of the Powerhouse Road territory was invalid, the Court must likewise vacate the East Shores transfer. The statute prescribes the means by which a board of county commissioners may transfer territory between "adjoining fire districts." N.C.G.S. § 69-25.11(4). The Powerhouse Road petition area lies between the East Shores petition area and the Glen Alpine Fire District. See Maps, Exhibits P and Q, to Complaint; see also Defendant's Memorandum in Opposition at 7-8. As the Powerhouse

---

[5] Since the Court finds that the petition was flawed because these property owners were not included as eligible signatories, it need not address Plaintiff's assertions that other names were improperly omitted as well.

Road area was not properly transferred, it remained at all relevant times part of the Lake James Fire District. Consequently, the Lake James Fire District completely separates the East Shores petition area from the Glen Alpine Fire District, such that the two areas are "not adjoining territory within the meaning of the statute." Opinion of North Carolina Attorney General, *supra*. As a result, the East Shores petition manifestly could not be adopted under N.C. Gen. Stat. § 69-25.11(4), and the County's approval of the petition was an ineffective transfer of land from the Lake James Fire District. *Knotsville Volunteer Fire Dep't, supra.*

IV. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff be granted Summary Judgment on all issues before the Court.

IT IS FURTHER ORDERED that the no-challenge provision contained in Paragraph 11(b)(iv) of the Contract is hereby declared void as unconstitutional.

IT IS FURTHER ORDERED that the Powerhouse Road transfer of territory from the Lake James Fire District to the Glen Alpine Fire District, approved by the Burke County Board of Commissioners December 19, 1995, is hereby **VACATED.**

IT IS FURTHER ORDERED that the East Shores transfer of territory from the Lake James Fire District to the Glen Alpine Fire District, approved by the Burke County Board of Commissioners September 17, 1995, is hereby **VACATED.**

IT IS FURTHER ORDERED that Defendant pay Plaintiff's fees and costs as provided by law.

A Judgment incorporating the findings herein is filed herewith.

THIS the 13th day of May, 1997.

/s/_____
LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

United States District Court
for the Western District of North Carolina
May 13, 1997

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:96-cv-00177

True and correct copies of the attached were mailed by the clerk to the following:

Robert C. Ervin, Esq.
Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin
P.O. Box 1269
Morganton, NC 28655-1269

Jim D. Cooley, Esq.
Womble, Carlyle, Sandridge & Rice
3300 One First Union Center
301 S. College Street
Charlotte, NC 28202-6025

W. Clark Goodman, Esq.
Womble, Carlyle, Sandridge & Rice
3300 One First Union Center
301 S. College St.
Charlotte, NC 28202-6025

Daniel A. Kuehnert, Esq.
Kuehnert &Ayres
The Commerce Bldg., Suite A
216 N. Sterling Street
Morganton, NC 28655-3345

cc:
Judge (x)
Other Lawyers Weekly (x)

Date: 5/13/97

Frank G. Johns, Clerk
By:/s/_____
Deputy Clerk

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
SHELBY DIVISION

CIVIL NO. 4:96CV177

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INC.,

Plaintiff,

vs.

COUNTY OF BURKE,

Defendant.

Filed: May 13, 1997

JUDGMENT

For the reasons set forth in the Memorandum and Order filed herewith,

IT IS ORDERED, ADJUDGED, AND DECREED that, the Court having granted summary judgment to the Plaintiff, the Powerhouse Road transfer of territory from the Lake James Fire District to the Glen Alpine Fire District, approved by the Burke County Board of Commissioners December 19, 1995, is hereby **VACATED**; and that the East Shores transfer of territory from the Lake James Fire District to the Glen Alpine Fire District, approved by the Burke County Board of Commissioners September 17, 1995, is hereby **VACATED**.

IT IS FURTHER ORDERED that Defendant pay Plaintiff's fees and costs as provided by law.

THIS the 13th day of May, 1997.

/s/LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

United States District Court
for the
Western District of North Carolina
May 13, 1997

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:96-cv-00177

True and correct copies of the attached were mailed by the clerk to the following:

Robert C. Ervin, Esq.
Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin
P.O. Box 1269
Morgantown, NC 28655-1269

Jim D. Cooley, Esq.
Womble, Carlyle, Sandridge & Rice
3300 One First Union Center
301 S. College St.
Charlotte, NC 28202-6025

W. Clark Goodman, Esq.
Womble, Carlyle, Sandridge & Rice
3300 One First Union Center
301 S. College Street
Charlotte, NC 28202-6025

Daniel A. Kuehnert, Esq.
Kuehnert & Ayres
The Commerce Bldg., Suite A
216 N. Sterling St.
Morgantown, NC 28655-3345

cc:
Judge (x)
Other Lawyers Weekly (x)

Dated 5/13/97

Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1815
CA-96-177-4-T

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INCORPORATED,

Plaintiff – Appellee,

v.

BURKE COUNTY, NORTH CAROLINA,

Defendant – Appellant.

Entered: August 26, 1998

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/Patricia S. Connor
CLERK

NORTH CAROLINA
BURKE COUNTY

CONTRACT BETWEEN BURKE COUNTY
AND THE LAKE JAMES COMMUNITY
VOLUNTEER FIRE DEPARTMENT, INC.

This contract made and entered into the 27th day of February, 1996, by and between Burke County, North Carolina, a body politic and corporate, hereinafter called "County", and Lake James Community Volunteer Fire Department, Inc., a non-profit corporation organized and existing pursuant to the laws of North Carolina, with its principal place of business in Burke County, North Carolina, hereinafter called the "Corporation".

WITNESSETH:

THAT WHEREAS, the County and the Corporation desire to enter into this contract to enable the County to provide for fire protection required by and pursuant to North Carolina General Statute 69-25.5; and

THAT WHEREAS, the County desires to grant this contract to enable the Corporation to make long range plans and begin provision of fire protection; and

THAT WHEREAS, the Corporation will satisfy the State of North Carolina authorities and the County of its operational readiness through satisfying the requirements as set forth within the North Carolina Administrative Code Section .0500 for a 9S rating, and having the required number of fire fighters with the required quantity and quality of training, and having its equipment in satisfactory operational condition and readiness; and

THAT WHEREAS, the Corporation has met the other requirements required by this contract to begin receiving county fire tax dollars such as an acceptable budget and proper financial controls and accounting procedures.

NOW, THEREFORE, that for and in consideration of the covenants and agreements between the parties hereto, the County and the Corporation hereby agree as follows:

1. This contract shall become *effective* on the first date of the month after the Corporation satisfies the Fire and Rescue Division of the North Carolina Department of Insurance of the fire department's operational readiness by satisfying the requirements as set forth within the North Carolina Administrative Code Section .0500 for a 9S rating. Satisfaction of the State of North Carolina requirements above referenced shall be evidenced in written form by the Fire and Rescue Division of the North Carolina Department of Insurance.

2. That the County contracts and agrees that it will cause to be assessed or levied a special tax of up to a maximum of 15 cents per $100.00 valuation of the real and personal property in all of or that portion of the Lake James Fire District, Burke County, North Carolina described and shown on Exhibit A. County will collect said tax as a part of the ad valorem taxes of Burke County, provided however, that beginning with the fiscal year 1995-1996, the amount levied annually shall be based on the needs projected in the budget estimate submitted by the Corporation to the County and approved by the County Commissioners.

3. a. That a special or separate fund shall be maintained by the County for funds collected as a result of said special tax.

   b. Taxes levied and collected pursuant to this contract will be disbursed at a time and schedule determined by the County. It is anticipated that no less than 1/12 of the annual budgeted amount of actual collected taxes will be distributed in any given month. It is anticipated that the Corporation will likely be receiving 1/12 of it's annual budgeted

amount each month. This contract gives the County a right to release only those tax proceeds actually collected in the area described in paragraph 2 of this agreement. This does not obligate the County to provide the Corporation any money beyond the amount of fire taxes annually collected, even if the same is less than the approved budget.

4. That the Corporation shall provide the necessary equipment and personnel for furnishing fire protection and first responder service as required by the County, and as established by the North Carolina Department of Insurance, as set forth in N.C.G.S. §58.2-40, Administrative Procedures Code Section .0500 for a 9S rating and/or Insurance Service Office, for the property located within said District, described in paragraph 2 of this agreement and will provide mutual aid to other areas of the County and similar assistance as may from time to time occur.

5. a. That all funds paid to the Corporation by the County shall be used exclusively to provide fire protection service within said District as set forth, and as permitted and allowed in accordance by Chapter 69 of the North Carolina General Statutes and other applicable law.

b. The Corporation shall have each member of its fire department trained in accordance with County and State requirements. The corporation shall maintain training records on each member to establish dates of training, duration of training, subject taught and who instructed said training.

c. The Corporation shall maintain its building in accordance with the requirements of that memorandum of November 30, 1995 from Building Inspector W.R. McDaniel regarding applicable provisions of the Building Code as from time to time amended.

6. That the corporation agrees to have performed an annual audit by the certified public accountant; that it is further agreed that the Corporation will present to County Commissioners a copy of the audit. Said audit is due on or before May 15 each calendar year.

7. a. That the Corporation agrees to comply with the county budgeting procedures.

   b. The Corporation agrees to submit budget estimates to the Board of Commissioners on forms provided by said Board; that the Corporation agrees also to utilize standard line items for accounting which are devised or consented by the County Finance Officer or Budget Director from time to time.

8. That it is agreed that the County may inspect any and all books, records, minutes, and accounts of the Corporation at any time, including, but not limited to, all corporate, financial, equipment and personnel records.

9. That this contract shall expire July 31, 2016, and may be extended for such term or terms as may be agreed upon by the County and Corporation.

10. Either party may terminate the contract upon giving ninety (90) days written expressed notice to the other party. Upon the effective date of termination by the Corporation and/or the County, identified excess cash received from the county (from fire tax), less current liabilities shall be immediately transferred to the County upon the County's request.

11. a. That the County and the Corporation agree to amend and/or execute any further documents necessary to more fully effectuate the implementation of the provisions contained within this document.

    b. i. Lake James Community Volunteer Fire Department, Inc. agrees to be subject to further County requirements regarding training, financial accountability and other

County minimum standards which may, from time to time be disseminated and made effective as to all County fire departments who have contracted or re-contracted with the County on or after January 1, 1996. Said minimum standards and requirements shall be disseminated from time to time via official memorandum from the County to the County fire departments and/or any such further requirements as the Board of Burke County Commissioners may require from time to time and promulgated by official memorandum from the County to the County fire departments; and

ii. Lake James Community Volunteer Fire Department, Inc. specifically agrees to maintain a minimum number of volunteers as required by the State of North Carolina, and with regard to the training of each of those fire fighters and first responders, the fire fighters shall meet minimum County requirements, including, but not limited to, a requirement of 36 hours of formal didactic training annually; and

iii. Lake James Community Volunteer Fire Department, Inc. agrees to be subject to certain minimum financial controls and accountability requirements of the county, including, but not limited to, the requirement that the County may at any time demand an internal controls and accounting procedures audit be conducted at the expense of the Lake James Community Volunteer Fire Department, Inc.

iv. The Lake James Community Volunteer Fire Department, Inc. specifically agrees to allow any citizen, group of citizens,

and/or property owners being served by the Lake James Community Volunteer Fire Department, Inc. (or property owners having property within the Lake James Fire Tax District) to petition the County to be considered for an annexation into another Fire Tax District (reference Chapter 69 of the North Carolina General Statutes) without any further consent of the Lake James Community Volunteer Fire Department, Inc. Further that the parties agree that any consent required by Chapter 69 with regard to such a petitioning process shall be presumed to have been given by the Lake James Community Volunteer Fire Department, Inc. pursuant to this paragraph. (This paragraph 11.b.iv is hereinafter referred to as "Consent Provision"). However, the parties agree that should the Lake James Community Volunteer Fire Department, Inc. refuse its consent to any above-referenced petition or challenge in the judicial system or otherwise the legality of the above – referenced consent provision, or otherwise challenge the legality of any of the changes in the Fire Tax District lines under N.C.G.S. §69-25.11 taking place effective as of or after June 30, 1996, then the parties agree any such actions will constitute a material breach of this Contract resulting in immediate termination of the Contract; and[1]

[1] However, this paragraph does not preclude members of the Board of Directors of the Lake James Community Volunteer Fire Department, Inc. or the Lake James Community Volunteer Fire Department, Inc. from retaining their freedom of speech rights pursuant to the U.S. and N.C. Constitutions. The Board of Directors can still voice their opinion to the Burke County Board of Commissioners or others as to their opinions concerning any such petition referenced in this paragraph. The Lake James Community Volunteer Fire Department, Inc. is by this paragraph

v. Lake James Community Volunteer Fire Department, Inc. understands and agrees that the County is contractually obligated to other fire departments to provide service within the Lake James Fire Tax District and that the County can only release to the Lake James Community Volunteer Fire Department, Inc. those funds (fire tax dollars) to the extent that said release of funds does not impair the ability of the County to fulfill its contractual obligations with said other fire departments serving the Lake James Fire Tax District; and

vi. To the extent paragraph 11 may conflict with any other provisions of this contract, the parties understand and agree that: (1) paragraph 11 controls and (2) all of paragraph 11 is material to this contract.

12. That the Corporation agrees to file with the County a true copy of the Articles of Incorporation, existing Bylaws and any changes made thereto from time to time; that further, the Corporation agrees to the extent permitted by N.C.G.S. §55A, to adopt bylaws which contain provisions enabling the citizens of the fire district to participate in the affairs of the Corporation by means of at least annual meetings and by vesting in a board of directors the authority to manage the affairs of the Corporation, and by providing for periodic elections of said board of directors by vote of those citizens served in the fire district.

IN TESTIMONY WHREOF, the County has caused this contract to be executed by the Chairman of the Board of County Commissioners and attested by the Clerk of the

---

simply agreeing not to veto or withhold official consent referenced in Chapter 69 of the North Carolina General Statutes, and further, the Lake James Community Volunteer Fire Department, Inc. is not to challenge Fire Tax District changes referenced above.

County Board of Commissiomers, and the Corporation has caused this instrument to be signed in its name by its president, attested by its secretary, its corporate seal hereto affixed, all by order of its board of directors duly given.

ATTEST:

Burke County Board of Commissioners

/s/ Frances McKinney (Seal)
CLERK

/s/ Thomas C. McCurry
CHAIRMAN, COUNTY COMISSIONER

ATTEST:

Lake James Community Volunteer Fire Department, Inc.

/s/ Dorothy W. Willets
SECRETARY

/s/ Glenn T. Lloyd
CHAIRMAN OF THE BOARD